IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ACCU-SPEC ELECTRONIC SERVICES, INC.,	)	
Plaintiff	)	
	)	
v.	)	C.A. NO.: 03-394 E
	)	
CENTRAL TRANSPORT INTERNATIONAL, INC. and LOGISTICS PLUS, INC.,	)	
Defendants	)	

ACCU-SPEC ELECTRONIC SERVICES, INC.'S RESPONSE IN OPPOSITION TO CENTRAL TRANSPORT INTERNATIONAL, INC.'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF DAMAGES IN EXCESS OF THE TARIFF'S LIMITATION OF LIABILITY

I. Introduction

Plaintiff Accu-Spec Electronic Services, Inc. ("Accu-Spec") has filed this lawsuit against defendants Central Transport International, Inc. ("Central Transport") and Logistics Plus, Inc. ("Logistics Plus"), seeking to recover damages to an x-ray machine transported by Central Transport from California to Pennsylvania. Central Transport seeks a determination as a matter of law, that its liability is limited by the terms of its Tariff because the equipment damaged in shipment was "used." Central Transport's argument and its characterization of the equipment is based on the scantest of evidence, and without any citations to the record.

To the contrary, the limitation of liability found in Central Transport's Tariff ("the Tariff") is not binding on Accu-Spec because:

1. the x-ray machine was not "used" within the meaning of the Tariff. see Meyers v. Volvo Cars of North America, Inc., 852 A.2d 1221, 1225-26 (Pa. Super. 2004);

2. Accu-Spec was not given a fair opportunity to choose rates at which to ship the x-ray machine. Emerson Electric Supply, Co. v. Estes Express Lines Corporation, 324 F.Supp.2d 713, 728 (W.D. Pa. 2004);

3. There is no evidence cited by Central Transport that the rate charged to Accu-Spec was based on the Tariff. First National Bank & Trust Co. v. Consolidated Freightways, 797 F.Supp. 1262, 1274 (E.D. Pa. 1992); and

4. The Tariff does not apply to Accu-Spec's claim against Logistics Plus.

II. Discussion

The sole basis of Central Transport's argument is that the x-ray machine purchased by Accu-Spec was a "used" machine because "it was a demo model previously used to demonstrate the capabilities of a new model." (Motion in Limine p. 4). This is an inaccurate statement. The equipment in question was built by Dage Precision Industries of Fremont California. Prior to the sale by Dage to Accu-Spec in 2003 the equipment was not used in a manufacturing environment and had never been previously owned by any third party. The useful life of the equipment is decades, involving thousands of hours of anticipated use. Prior to its sale to Accu-Spec, the equipment may have been operated by Dage to demonstrate to potential customers how it functioned. The anticipated testimony is that there exists no record of the precise hours of such use, but the upper limit of use prior to sale would be twelve (12) hours. Twelve hours of controlled operation by the manufacturer of the equipment would not amount to one tenth of one per-cent (00.01%) of the equipment's useful life. Therefore, any "use" of the equipment prior to its sale to Accu-Spec is de minimis and does not constitute a "used" machine as defined by the Tariff.

Central Transport has not cited any authority for what constitutes a "used" piece of machinery. Pennsylvania law makes clear that simply because an item is identified as a "demonstrator" does not automatically mean that it is "used." For example, automobiles used as demonstrators may be considered new. Meyers v. Volvo Cars of North America, Inc., 852 A.2d 1221, 1225-26 (Pa.Super. 2004).

Furthermore, the limitation of liability does not apply in this case because Accu-Spec was not given a reasonable opportunity to choose between a higher and lower rate which was dependant upon the liability assumed by Central Transport. Emerson Electric Supply, Co. v. Estes Express Lines Corporation, 324 F.Supp. 2d 713, 728 (W.D. Pa. 2004). The Court in Emerson Electric made clear that the fair opportunity requirement is crucial to insuring that a shipper makes a well-informed, deliberate choice regarding limitations of liability, and the rule is consistent with Congress' intent that carriers are liable for actual property damage because carriers are generally in the best position to prevent such damage as well as make it part of their cost of doing business. Emerson Electric, 324 F.Supp at 730-31.

The case of America Cyanamid Co. v. New Penn Motor Express, Inc., 979 F.2d 310 (3rd Cir. 1992) cited by Central Transport is inapplicable to this case because the Bill of Lading (issued by the plaintiff/shipper) in that case contained conspicuous dark type that provided two liability rates and stated that the "released value" specified on the plaintiff/shipper's form of Bill of Lading (not exceeding $1.65 per pound of freight) would control. Id., at 311. No such circumstances exist in the present litigation.

In the present case, Central Transport offers no evidence of record to support its conclusion that Logistics Plus "[has] done business with Central Transport continuously for years, and were well aware of the Tariff and their obligations under the same." (Motion in Limine pp. 3-4). For the foregoing reasons, the limitation of liability in the Tariff is inapplicable to the facts of the present case.

Moreover, at least one Federal District Court has held that a limitation of liability in a tariff is not applicable where the carrier cannot show that the shipper was charged a tariff rate. First National Bank & Trust Co. v. Consolidated Freightways, 797 F.Supp. 1262, 1274 (E.D. Pa. 1992). In that case, the District Court held that when the amount charged was not a tariff rate dependant upon the value of the property, but a flat amount, bearing no discernable relationship to the tariff rate schedule, the limitation of liability should not apply. Since the shipper was not given a reasonable opportunity to choose between higher and lower rates, the limitation of liability did not apply. Id.

In the present case, it is undisputed that the x-ray machine weighed 5280 lbs. Accu-Spec paid Logistics Plus the sum of $590 to ship the x-ray machine. This $590 equals Central Transport's charges plus a mark up by Logistics Plus. Nothing in the record of this case demonstrates that the amount charged by Central Transport to Accu-Spec had any relationship to Central Transport's tariff. Therefore, the limitation of liability does not apply.

Regardless of this Honorable Court's ruling on Central Transport's Motion in Limine, Logistics Plus has no basis for arguing that the limitation of liability in the Central Transport Tariff limits Accu-Spec's claim against Logistics Plus. Therefore, Accu-Spec is entitled to present evidence concerning the full amount of its damage at trial.

III. Conclusion

For the foregoing reason, plaintiff Accu-Spec Electronic Services, Inc. respectfully requests this Honorable Court to deny Central Transport International, Inc.'s Motion in Limine to Preclude Evidence of Damages in Excess of the Tariff's Limitation of Liability.

Respectfully submitted,

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